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No. 810.

IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

PATRICIA THURNAU, as Administratrix of the Estate of PHILIP GEORGE THURNAU, Deceased,

Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, Second Circuit.

REPLY BRIEF OF PETITIONER.

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Throughout respondent's brief, two principal points stand out: Namely the vacuum created by the failure to even mention Reese and the glaring sealing off of Wold and Kossman in a perfectly insulated vacuum where there is not even a breath of a bus strike.

1. There is not one word mentioned about Reese and his testimony about the common practise on the SS. *Pegasus* to take men to and from the ship in the available vehicle.

This most important testimony places the case squarely within *McDonough,* and even within the exception in *Robinson, Adm'x* v. *Northeastern SS. Corp.*

2. Respondent wishes to make this Court believe as a matter of law that the utterly fantastic testimony of Wold

that he knew nothing of the bus strike, even though he later lived in Mobile, and even though many of the crew came from Mobile, even though the main shipping office was in Mobile, even though there were appeals by radio and press for men to take fellow workers to and from work, and even though as an officer he was engaged in the transportation business, where he had to know something about how the passengers and cargo were going to get off the ship.

Respondent wishes to make Wold and Kossman, deaf, dumb, and blind as a matter of law to any paralyzing bus strike, which existed for two months, and thus completely insulate itself from liability.

Insulation of such incredibly ethereal material based on such colossal ignorance and housed in such vacuums, could only be provided by a jury, if they were ever allowed to find that such a fact could exist even in this day and age of miracles.

3. Respondent without even having had the benefit of Kossman's testimony (the case was dismissed at the close of plaintiff's case) tells the Court that Kossman, a First Assistant Engineer, was prepared to swear to the same nincompoopery as Wold.

4. Petitioner can only sadly observe that if the shipowner provided such ignoramuses, so deficient in sight and hearing, it can hardly urge that it provided decedent with proper and sufficient officers, to say nothing of just ordinary seagoing personnel, and the shipowner would surely be liable for failing to supply seaworthy fellow servants. (*Keen* v. *Overseas Tankship Corp.* 194 F. 2d 515)

Equally incredible is the fact that respondent does not even mention *Paul* v. *U. S.* and *Lemon* v. *U. S.* the very decisions upon which the Court of Appeals in the decision

sought to be reviewed rested its decision at the urging of counsel for respondent, and is trying to be more learned that the Court of Appeals by fathoming reasons why the Court did not even mention the *McDonough* or *Pillsbury* cases.

Even the *Paul* case, the respondent's principal authority, had a strong dissent from Judge Biggs.

As authority in the decision sought to be reviewed, the Court cited one Court of Appeals decision (Paul) and one District Court decision (Lemon), neither of which had the slightest applicability to the facts in the petition. It failed to cite much less distinguish two applicable cases of other circuits, with contrary opinions supported by full benches.

The *per curiam* opinion stating that a shipowner is under no obligation to furnish transportation is an oversimplification of the novel question inherent in the facts.

These facts involve fellow servant negligence during shore leave committed on returning to the ship.

The two cases upon which the opinion is based in the decision sought to be reviewed are readily distinguishable since both are based on third party negligence of a total stranger to the ship.

Petitioner's decedent was not killed at the hands of a third party independent owner of a dock (Paul). Nor was he killed at the hands of a third party independent owner of a launch (Lemon), or any other third party not part of the ship's complement.

Decedent was killed at the hands of fellow servant Wold as a matter of law since both were returning to the ship in the course of employment (McDonough), (and the decision is strangely silent on *McDonough*, although urged throughout petitioner's brief in the Court of Appeals as well as *United Pacific Ins. Co.* v. *Pillsbury*).

Since the *Paul* case was by a divided court, with a dissent from Judge Biggs, and the decision sought to be reviewed has completely failed to consider two contrary opinions written by two other Circuit Courts of Appeals, supported by full benches, it is respectfully urged that certiorari should be granted.

A. Assume arguendo, that Wold or Kossman had been sued individually or jointly for their negligence, would not their individual and joint defense be that they were acting in the course of employment and within the scope of employment? And that their actions were reasonable under the circumstances of the bus strike.

a. Wold as the driver of the car and officer of the defendant to escape liability for the unquestioned negligence proved by the photograph, would have urged that he was taking a shipmate back to the ship, where both were attached to the ship under whose articles they were, and the accident occurred because of the haste in so doing, and acted reasonably under the circumstances.

b. Kossman, as high ranking officer of the defendant aboard the SS. *Pegasus,* to escape liability for having loaned the car to young Wold, would have urged that members of the crew had been transported to and from the ship, driven by Wold, while he sat in the car, and the only reason that he hired the U-Drive-It was because of the strike, and as Reese testified, it was common practice on the ship to take seamen to and from the ship in the available vehicle.

c. Both would have urged that there were radio, and press appeals for car drivers to take fellow workers to and from work because of the bus strike, and question why they should be liable and not the company.

d. Both would have urged that *ALCOA* had principal shipping offices in Mobile, Alabama, and since this was the principal shipping port for this company in the Western Hemisphere, that *ALCOA* must have known of these appeals, as well as Kossman.

B. It is reasonable to assume that if Wold had been sued, the question of whether he had acted reasonably in performing his duties in his masters' behalf in taking a shipmate back to the ship, during a bus strike, would have been of prime importance.

Kossman would undoubtedly have urged that as a high ranking officer of respondent on the SS. *Pegasus*, he was acting for the benefit of the ship in hiring the car, and would have pointed to the fact that Wold had never hired such a vehicle before, and he, Kossman, had hired it only once before which might have been during the strike.

a. Kossman and Wold would have stressed the fact that decedent, was also an officer of the respondent, and a fellow servant.

C. Wold could have pointed significantly to the fact that although the trial did not come up because the calendar was four years behind, yet he was employed all that time by respondent, only once in three years, (it was three years later when his deposition was taken in Mobile) had he been on one of respondents' ships that had come farther north than Mobile, and then for only a day or two did it stop near New York where the widow resided.

Were the respondent's actions consistent with a confident belief that only Wold and Kossman were individually liable, and not the shipowner??

D. What court would have said as a matter of law that they were acting individually and were individually liable and that the issue did not even have to be submitted to a jury as the court has done in the decision sought to be reviewed.

The case falls squarely within the *McDonough* case and even the *Robinson* case on the testimony of Reese that it was common practice on the SS. *Pegasus* to take men to and from the ship in the available vehicle.

And certainly Kossman, as a first assistant engineer, would have authority to transport men to and from the ship during a bus strike in a vehicle which he could provide, and in this emergency when radio and press appeals called for people to transport fellow workers to and from work, he can not be said as a matter of law to have acted without the scope of his employment, especially where defendant had its principal shipping office in Mobile, and must have known of these conditions including such radio and press appeals. *Westcott* v. *U. S. Fidelity & Guaranty*, 156 F. 2d 20 (4th Cir.); *Heaps* v. *Cobb*, 45 A. 2d 73.

Nor would the court as a matter of law be justified in imputing such complete stupidity to the shipping office in Mobile which respondent seeks to ascribe to Wold and Kossman.

1. Under the undisputed facts in this case, of the bus strike effects, and the testimony of Reese that it was common practice on this ship to transport crewmen to and from the ship in the available vehicle, Wold was acting in the scope of his employment in transporting decedent back to the ship in the very same car that other seamen had been taken to and from the ship.

Heaps v. *Cobb* (*supra*).

2. Defendant can not maintain that it did not know of the effects of the bus strike in the face of Douville's undis-

puted testimony as to radio and press appeals as Douville testified that "Neighbors join with one another, in forming car pools, to take people to work and return". It must be borne in mind that Mobile, Alabama, was the main shipping port for the SS. *Pegasus,* where aluminum ore cargoes were discharged at the aluminum ore docks.

It was also the port where the passengers were discharged.

It was also the port where old articles were terminated and new ones signed.

It was the port where defendant maintained very important offices in its operation if not the most important shipping offices in the Western Hemisphere.

Heaps v. *Cobb* (*supra*).

3. Since the defendant engaged in the transportation business, undoubtedly was aware of the bus strike, (since in treatment of passengers as well as cargo and crew, it would soon be out of business if it were blind to such patent transportation difficulties) it can not be said as a matter of law by a Court that Kossman as a high ranking officer of the SS. *Pegasus,* did not act within the scope of his employment in hiring the car when Reese testified it was common practice on the ship to transport crewmen to and from the ship in the available vehicle.

Wold too as an officer of the defendants fully familiar with the common practice of transporting crewman to and from the ship in the available vehicle during this bus strike can not be said as a matter of law to have acted without the scope of his employment in transporting decedent another officer back to the ship, and to have acted purely for his own pleasure.

4. Bearing in mind that defendant is an inanimate object that must necessarily act through officers, how can Kossman's actions as a high ranking officer of the subject vessel SS. *Pegasus* in turning the car over to Wold, another officer, he himself according to Wold was in the car when Wold was driving and men were thus transported, be construed as a matter of law as not being within the scope of his employment, and being purely a private act for his own pleasure.

Especially when only seamen from the SS. *Pegasus* were transported in this vehicle in Mobile, during the bus strike, and when this vehicle was hired solely for the two day stay in Mobile.

5. In taking account of the authority of Kossman in hiring this vehicle, the proof shows in the years of service with the defendant, Kossman had hired a U-Drive-It only once before (and that might have been during the strike) and Wold had never hired a U-Drive-It.

Conclusion.

The Court of Appeals affirmed a dismissal of the complaint on the authority of *Paul* vs. *U. S.*, which had a dissenting opinion by Judge Biggs.

The decision sought to be reviewed is contrary to the law in other Circuits.

Respondent's brief fails to even attempt to uphold Judge Clark and Judge Medina on the very cases it urged, and now urges as a fact Kossman's proposed testimony.

Petitioner has been deprived of a jury trial without due process in this death action.

Swensson v. *N. Y. Albany Despatch Co.*, 309 N. Y. 497.

Certiorari should be granted.

Respectfully submitted,

HENRY FOGLER,
Attorney for Petitioner.

Dated April 18, 1956.